IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANT

EMANUEL REDFIELD,
Counsel for Appellant,
60 Wall Street,
New York 5, New York.

TABLE OF CONTENTS

TABLE OF CASES

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 167

SIDNEY J. UNGAR,

Appellant,

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANT

Opinions Below

The Court of Appeals did not write an opinion, but in both its remittiturs (R. 164, 165) that court made the following significant observation, pertinent to the issues raised here:

> "However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should, where disposition of the contempt charge can be withheld until after trial, and where it is otherwise practicable, order the contempt proceeding to be held before a different judge."

The Appellate Division did not render any opinion in either proceeding.

The trial term wrote no opinion.

Jurisdiction

(i) The jurisdiction of this court is conferred by 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of this court to review the judgments on appeal: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Whitney* v. *Calif.*, 270 U. S. 357, 360; *Louisville & Nashville R. Co.* v. *Higdon*, 234 U. S. 592, 598; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67; *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 677; *Cantwell* v. *Connecticut*, 309 U. S. 626; *Raley* v. *Ohio*, 360 U. S. 423, 434-6.

(ii) The judgments of affirmance by the New York Court of Appeals were made and entered in both cases on February 28, 1963. A notice of appeal to this Court was filed in the Supreme Court of the State of New York, Appellate Division, First Department on May 22, 1963 and another Notice of Appeal to this Court was filed in the Supreme Court of the State of New York, County of New York on May 23, 1963. The Notices of Appeal were from the respective courts. The Supreme Court of the State of New York is the successor to the Court of General Sessions.

(iii) Probable jurisdiction was noted on October 14, 1963.

Questions Presented

1. Is Section 750 of the Judiciary Law of the State of New York on its face, as construed and as applied, unconstitutional in that it violates the due process clause

of the Fourteenth Amendment to the Constitution of the United States?

2. Is Section 751 of the Judiciary Law of the State of New York as construed and as applied unconstitutional in that it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was appellant, a lawyer since 1935, denied due process of law, when he was tried for contempt of court by the same judge who accused him of the crime?

4. Was appellant denied due process of law when he was tried and adjudged in contempt of court by said judge on December 13, 1960, 18 days after the incident of contempt and 7 days after the conclusion of the trial at which the incident occurred?

5. Was appellant denied due process of law at the said hearing on December 13, 1960 when the said trial judge in violation of the Rules of this court, refused the appellant and his counsel a reasonable adjournment of said hearing to enable him to prepare against such charges, considering in this question that the only indication and notice of the contempt proceeding was given by service of an order to show cause late Thursday afternoon, December 8, 1960 returnable the following Tuesday morning, December 13, 1960, with Saturday and Sunday intervening, during which a 17" snowstorm visited New York, paralyzing traffic on Monday and considering also that the appellant made claim in good faith that the alleged contemptuous words were true, but were unintentionally uttered as a result of the emotional pressures created by the judge in three consecutive court days on the witness stand at a trial in which he, a lawyer, although not a defendant and denied counsel to protect his rights,

was the subject of attack as a conspirator in the charges on trial?

6. Was appellant denied due process of law in that he was adjudged in contempt of court for having made the following statement while a witness at the trial under the following circumstances:

> "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The appellant had been on the witness stand on November 22, 23, 25, 1960 and on the latter day he made the foregoing remark (which according to the appellee's notice of motion forms the basis of the contempt charge). And the further circumstances are that immediately preceding the remark, the appellant had repeatedly and respectfully pleaded with the judge that he was emotionally upset and that he be given a recess to enable him to compose himself, verified by the fact that during a recess subsequently called, appellant had medical assistance and continued as a witness to completion of his testimony without further incident.

7. Was appellant denied due process of law in being tried for contempt by said judge who was hostile toward him from the inception of his role as a witness?

8. Was appellant denied due process of law in being tried for contempt by the judge who was personally involved and against whom appellant made personal attacks.

9. Was appellant denied due process of law by the failure of the Court of Appeals to decide this case in appellant's favor, although it held that in a contempt pro-

ceeding, where disposition of the contempt charge of wrongdoing by the trial judge can be withheld until after the trial, the accused should be tried before another judge?

Statutes Involved

Section 750 Judiciary Law of New York (McKinney's "Consolidated Laws of New York Annotated"): Power of courts to punish for criminal contempts

> "A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
>
> > "1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. • • •"

Section 751 of the Judiciary Law, insofar as pertinent herein, provides:

> §751. Punishment for criminal contempts
>
> "Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. • • •
>
> "such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense."

Section 752. Requisites of commitment for criminal contempt; review of certain mandates

"Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense, must be set forth in the mandate of commitment. Such mandate punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice act."

Section 755. When punishment may be summary

"Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offense, and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefore. Such order is reviewable by a proceeding under article seventy-eight of the civil practice act."

Statement

The appellant, who has been a lawyer in New York since 1935, was convicted by appellee of a criminal contempt of court on December 13, 1960 under Sections 750 and 751 of the Judiciary Law of the State of New York in that on November 25, 1960 in open court "in a loud, angry, disorderly, contemptuous and insolent tone directly tending to interrupt the proceedings of the court and to impair the respect due to the authority of the court," he made the following outburst while on the wit-

ness stand, where he had been for the third consecutive day:

> "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The court is suppressing the evidence."

The contempt proceeding was commenced by an order to show cause which stated, "Why he should not be punished for criminal contempt of court, committed on November 25, 1960, as hereinafter specified" (R. 67). The specification thereafter appears in the language just quoted (R. 90-91). Although the citation contains recitals of other material, the order and judgment of conviction confirms that the utterance on November 25, 1960 was the sole charge of contempt (R. 40):

> "ORDERED AND ADJUDGED, that Sidney J. Ungar be and hereby is found guilty of criminal contempt of court committed on November 25, 1960, during the November 1960 Term continued, he having committed the acts hereinabove recited, and having shouted at the Court, 'I am being coerced and intimidated. The court is suppressing the evidence,' while said Court was in session, and in the immediate view, hearing and presence of the jury, by conduct which was wilfully contemptuous and insolent, and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it."

To complete the facts, it is necessary that the events prior to the incident be shown:

On January 20, 1960 an indictment was filed against one, Hulan Jack, charging him in conspiracy with appellant and others not named, with obstruction of justice

and accepting gifts and loans from appellant. Appellant was subpoenaed as the key witness and testified for seven days. A disagreement of the jury followed.

Appellant, believing that certain vital testimony establishing defendant's innocence had not been elicited, at the trial, even by defendant's counsel who considered appellant hostile, thereafter moved by formal motion before the trial judge to be made the court's witness and advise the court of such evidence, but the judge refused to consider the motion and disregarded it (R. 68-69).

A second trial was held before the same judge, during which the appellant was again a witness nominally on behalf of the prosecution but was ruled hostile (R. 32). He testified for four court days, November 22, 23, 25 and 28, 1960.

The appellee presided as trial judge at both trials, and evidently vexed with appellant about the first trial, recessed the trial on the morning of the second day of appellant's testimony, ordered appellant into chambers and admonished him about contempt (R. 84).

Appellant had been the subject of extensive publicity with consequent damage to his reputation. As the object of attack by both the district attorney and defense counsel, as the object of appellee's hostility. The appellant, after three unsuccessful pleas for a recess, in anguish and emotional stress, unintentionally blurted out what he felt. Appellant not only believed, then, but still believes that he was badgered and prevented from testifying fully as to his relationship and the transactions with Jack, which testimony if fully developed, would have proved Jack innocent (R. 106, 107; 26-32; 45-48; 52, 53, 54, 68-69; 84, 85-87; 92).

Prior to the incident of the alleged contempt, the district attorney pressed appellant, his own witness, with

questions which appellant could not understand and which he stated he could not answer properly and truthfully in the manner asked (R. 52-55).

Then the following ensued (R. 55-59):

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances.

• • • •

The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand.

The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude

and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

"Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?")

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The Defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess.

Do not discuss the case, ladies and gentlemen, do not form or express any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Since we are advancing the hour when we start our luncheon recess, we will get back here at 1:45. You may retire.

(The jurors then left the Court room and the following took place in their absence:)

Mr. Baker: There has been a statement made by the witness that he is emotionally or mentally incapable of testifying. So that the record would be crystal clear, I make a request of the Court to appoint a doctor to determine whether or not there is malingering on the part of the witness or anything of the sort.

The Court: In my judgment, this is as near as malingering could ever be determined from my observation.

The Witness: I join in that request, if your Honor please.

The Court: What is the ground of your application?

Mr. Baker: The ground of my application is, if the Court please, the law presumes that when a witness testifies he is to be lucid. This witness says he is not. Any testimony he gives may be prejudicial to the rights and interests of the defendant. That's the ground of my objection, and so that the record would be clear, whether this is malingering or not, there is a mental and emotional condition presently existing in this witness so that he could not be a competent witness to testify, all of which may be to the detriment of the defendant.

The Court: I shall reserve decision on your application and I shall direct the witness to remain in court until I decide it. The Court will take a recess until 1:45.

(After a short recess the Court returned to the courtroom, Mr. Baker and the defendant being present, and the following took place:)

The Court: Mr. Baker, I wanted to get both sides here. The reason I have asked Mr. Ungar to remain was because if I had made a decision, why, then, I could have acted on it. Since I haven't made a decision I see no point in having him remain here. He is entitled to take his luncheon recess the same as anybody else, but I didn't want to lose time if I could help it.

Mr. Baker: I am glad the Court indicated the purpose of asking the witness to remain.

The Court: That was the only purpose, because I said to you I reserve decision, and I thought I might be able to decide it and save time. Would it be a burden to give me another five minutes?

Mr. Baker: No, your Honor.

The Witness: Is your Honor addressing me?

The Court: Yes.

The Witness: No, it is not a burden, your Honor, because I was not malingering, and I have been shaking ever since this issue started.

The Court: I just want five more minutes and if I don't decide it by that time, then we will all go to lunch.

(A short recess was taken; the Court left the courtroom and returned.)

The Court: Mr. Ungar, I haven't made up my mind what course of action I should take. I think you ought to take a recess until 1:45. Let us see what the situation is at that time.

The court did nothing to determine appellant's emotional condition at that time or any other time. During the recess the appellant obtained medical assistance and continued his testimony that day and the subsequent trial date without incident (R. 61-64).

The following appears at R. 61:

"The Court: Now, Mr. Witness, before we took a luncheon recess you personally, as a witness, had asked for a recess. Do you recall that?

The Witness: I do, your Honor.

The Court: Now that we have had the luncheon recess and you have come back, do you still ask for a recess?

The Witness: Well, I would like to report to the Court that I went to the hospital and received an injection, and I think that I can proceed temporarily, in addition to the pills that I have taken this morning.

The Court: Very well.

Mr. Scotti: May I proceed, your Honor?

The Court: Yes."

At R. 63 the following is recorded:

"The Court: I thought it was obvious to everyone that when the witness resumed the stand at 1:45 P.M. after the luncheon recess, and the Court asked the witness whether his request for a recess while testifying on the stand, and before the announcement of the luncheon recess, still stood. The witness said he had been to a hospital to get a shot, and that he could.

Mr. Scotti: That he could proceed temporarily.

The Court: That he could proceed temporarily, and I thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed, and consequently made no formal declaration on the record.

To avoid any possible question about that I now deny the motion."

The Contempt Proceedings

At no time while appellant testified did the appellee cite or rule him as contemptuous. Nor did he seek an explanation for the emotional state of appellant on November 25, 1960 when he was requested by both appellant and by counsel for the defendant to do so (R. 58-64).

Instead, appellee waited until after the conclusion of the Jack trial on December 6, 1960. Thereupon on Thursday, December 8, 1960 at about 5 P.M. he caused an order to show cause to be served on appellant consisting of 24 pages in the printed record returnable on Tuesday morning, December 13, 1960, citing appellant for the contempt of November 25, 1960. It should be observed that although the appellant was charged with only the single incident of contempt on November 25, nevertheless, that charge is preceded by 13 recitals of other events which but served to perplex the appellant in attempting to defend. Appellant's burden to prepare his defense was thus compounded. The appellant thus had only about four days in which to meet the charges and those four days were interrupted by the intervening Saturday and Sunday during which a 17 inch snowstorm fell, paralyzing traffic on Monday. Appellant retained counsel on Saturday. But this counsel felt that he couldn't adequately prepare a defense unless an adjournment were obtained. On the return day on December 13, 1960, that counsel appeared with appellant and requested the adjournment on the ground of his lack of preparation and also because of his actual engagement at a trial in another court of record. It was denied. The denial was in breach of Rule VII of appellee's court which requires that in the event of an actual engagement by counsel in a trial in a court of record, the action shall be passed for the day or

until the trial is concluded. Whereupon, counsel withdrew, leaving appellant without representation. Appellant requested an adjournment because he could not go on without counsel. The request was denied (R. 93, 95, 96-101; 105).

Appellee stated that appellant had three weeks' notice of the contempt. This is not accurate. Nothing was done by appellee from November 25 to December 8 to put appellant on notice of charges. All that appellee did was to admonish appellant to "keep himself available". This, it is submitted, is not notice of contempt charges. Appellant had no notice until December 8 and until then could very well have had the impression that the incident, in the course of time, would subside and pass (R. 104).

Appellant objected, that he had a right to counsel, in view of the character of the proceedings, and that he was being deprived of counsel although he made all reasonable efforts to provide one. (R. 104). Appellant also had a defense of good faith to the proceeding by showing the provocation, the lack of intent to be offensive and the emotional strain that led to the outburst.

Nevertheless, appellee proceeded, and adjudged petitioner in criminal contempt of court. He committed appellant to jail for ten days and fined him $250.

Thereafter, the appellant appealed to the Appellate Division of the Supreme Court of the State of New York, First Department from the Mandate of Order and Judgment of Conviction dated December 13, 1960. Out of abundance of caution as to the proper procedure, the appellant also instituted a proceeding entitled "In the Matter of the Application of Sidney Ungar * * * to review a determination, etc." The Appellate Division dismissed the appeal on April 3, 1962 and affirmed the Order and

Judgment on April 3, 1962 in the application for a review (R. 4, 156).

Appeals were thereupon taken to the Court of Appeals from both judgments. That court on February 28, 1963 affirmed both orders, with the memorandum in each as set forth above (p. 1).

The repugnancy of Section 750 Judiciary Law to the federal constitution was raised at the contempt proceeding (R. 102); while not explicitly stated is nevertheless fairly comprised therein. It is also implicit throughout the entire proceedings in the original application before the Appellate Division.

The constitutionality of Section 751 Judiciary Law was raised explicitly before the Court of Appeals on a motion for a rehearing, because the construction for the first time of the statute permitting a judge to summarily sit in his own contempt charge after the trial had been concluded was first made at that stage and could not have been anticipated (R. 161-164). *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677; *Herndon* v. *Georgia*, 295 U. S. 441; *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Great Northern Railway Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366; *Tomkins* v. *Missouri*, 323 U. S. 485, 487; *Pollard* v. *United States*, 352 U. S. 354, 359. Although the Court of Appeals denied the rehearing, it nevertheless certified that there was presented and necessarily passed upon whether the rights of the appellant to due process under the Fourteenth Amendment were violated. The challenge to repugnancy in its application is also implicit throughout the contempt proceedings before appellee and in the proceedings before the Appellate Division.

The federal questions sought to be reviewed were raised by appellant in the contempt proceeding in the first instance (R. 96-100), at which time counsel retained

by appellant sought an adjournment, but withdrew as counsel when the adjournment was refused. Appellant at that hearing objected to the validity of the hearing because of the postponement of contempt proceedings until after the trial (R. 101); that the charges of contempt are not defined by Section 750 Judiciary Law (R. 102); his right to counsel of his own choice and a reasonable opportunity to prepare a defense (R. 103-105); and that the contempt proceeding should be heard by another judge especially because of his marked hostility and bias (R. 108-109).

SUMMARY OF ARGUMENT

In a prosecution of a charge for a criminal contempt, the accused must be accorded due process of law at every stage of the proceeding as in any other prosecution. The errors of past misconceptions should be corrected. Moreover, in a case such as this one, where the trial of the contempt charge occurs subsequent to the termination of the case at which the alleged contempt occurred, no reason prevails for evading the requirements of due process.

It is fundamental therefore that the accused be prosecuted only under a law certain enough so that people can know what is forbidden and not under one such as the one in the present case, whose interpretation by the judge is *ad hoc* legislation.

Due process minimally, forbids the same judge to sit in a contempt proceeding held after the termination of the case at which the alleged contempt occurred before him. This would be true, whether or not he is adverse to the accused, embroiled with him or just vindicating the supremacy of the court. In such instances, he is involved in his own case and cannot be considered

impartial. In practice, it would be impossible for him to make rulings relating to himself judicially, if he were called as a witness. In this case, where he is an adversary of the accused, the doctrine is easier of application.

Due process also insists that the accused be represented by counsel of his own choice and this right be an effective one in which no obstacles are placed in the route to such selection. Appellant was deprived of an effective opportunity to be represented by counsel.

The words of alleged contempt were uttered in an atmosphere of hostility, confusion and emotional strain. Even if the appellant's conduct could be interpreted to fall within the scope of the vague statute under which he was accused, nevertheless, his conduct in the context in which it appears would not be held contemptuous without violating due process.

ARGUMENT

Introduction

It is elementary that a fair trial must be held by an impartial judge. Impartiality implies freedom from subjective influences, such as those arising from being the accuser in the charges. Indeed, in our society, the separation of the functions of the trial jury from the grand jury at the considerable cost such arrangement involves, attests to this keystone of justice. Another fundamental talisman of justice is that the accused have a full trial with the effective right to counsel of his own choice.

Yet in contempt proceedings, especially where the alleged contempt occurs in the presence of the court, assertions have been made that a judge may summarily

punish without even making inquiry into the cause of the conduct or into factors that may excuse it. This departure from normal requirements of fair play stirs interest in the origin of the doctrine upon which it rests. Frankfurter and Landis made a study of the history of the doctrine ("Power to Regulate Contempt", 37 Harvard Law Review 1010). They reveal that the justification was found in an unpublished opinion of Chief Justice Wilmot in *The King* v. *Almon* (1765), 24 Law Q. Rev. 184, in which assertion was made that it stemmed from immemorial usage. Subsequent researches by Sir John Charles Fox proved the "immemorial usage" to be without basis, in "The Summary Process to Punish Contempt", 25 Law Q. Rev. 238, cited by Frankfurter and Landis, *op. cit.* 1047. Whatever usage existed was found in the Courts of Star Chambers and in occasional assertions during the 17th and 18th centuries.

For a hundred and more years the judiciary has been trying to free itself from the error, Frankfurter and Landis assert, for courts must guard against arbitrariness and search for other means to attain the end sought (p. 1051).

Mr. Justice Black who is not given to genuflexion to the British concepts and practices which the Bill of Rights sought to nullify, said this in *Green* v. *United States*, 356 U. S. 156 at 212:

> "But far more significant, our Constitution and Bill of Rights were manifestly not designed to perpetuate, to preserve inviolate, every arbitrary and oppressive governmental practice then tolerated, or thought to be, in England. Cf. *Bridges v. California*, 314 U. S. 252, 263-268. Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of

> government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified."

And to those observations should be added those in *Pennekamp* v. *Florida*, 329 U. S. 331, 348, that a judge must be made of sufficient strength to be insensitive to the give and take of litigation.

Since due process demands the fundamental requirements of an impartial judge and of a full hearing, with representation by counsel, it follows that such rights must be accorded to an accused. Even if it were admitted, for the sake of argument, that the anomalous doctrine of summary proceedings is necessitated by the practical needs of maintaining order at a pending trial, such doctrine would have no validity if the prosecution for the contempt took place, like this case, after the trial was terminated. And this would be true whether the conduct took place in the presence of the judge or not. See *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425, where Justices Holmes and Brandeis, in dissent stated, "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

If due process under the Constitution compels the conclusions stated here, then it is seasonable for this court to state, here and now, that such is the requirement of

due process. If revision of the errors of the past is required, as several justices of this court have indicated, then this case is ripe for such decision. Notable examples of revision of constitutional doctrine are *Erie Railroad* v. *Tompkins*, 304 U. S. 64 which discarded *Swift* v. *Tyson*, 16 Peters 1, after error of almost 100 years and *Brown* v. *Board of Education*, 347 U. S. 483 which overruled the 60 year, but erroneous constitutional doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537.*

Mr. Justice Black urged revision in *Green* v. *United States*, 356 U. S. 165, at 196 (concurred in by the Chief Justice and by Mr. Justice Douglas):

> "The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, 'perhaps, nearest akin to

* It serves no useful purpose to marshal a list of justices of this court who voted in the past for or against a doctrine. Cf. Mr. Justice Frankfurter, when concurring in *Green* v. *United States* was favorably impressed by the list of judges who previously had voted to support summary contempt proceedings. This is in startling contrast with his repudiation of the doctrine 35 years earlier when more than two-thirds on that list had already indicated their preference. ("At least let us not import into the Constitution of the United States discredited practices of Stuart England" *op. cit.* 1058). In any rectification of existing rules of law, it is presumed that the prior rule had acceptance by other judges. *Tyson* v. *Swift*, for example, during its 100 year career was notable for its popularity among federal judges. Tabulating predecessors can only be loaded against change, for if a doctrine endured any length of time, it was accepted by others, and the scale would necessarily be weighted against change by numbers. A more credible test is: has experience shown that the rule does not comport with constitutional obligations, especially those of due process. "* * * the Supreme Court is not likely to embalm exploded history in the Constitution" (Frankfurter and Landis, *op. cit.* 1012).

despotic power of any power existing under our form of government'."

Again at page 198:

> "Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit. It seems inconsistent with the most rudamentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws, to concentrate this much power in the hands of any officer of the state. No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence."

The New York Court of Appeals itself had some misgivings about the procedure of which appellant complains, for while affirming, it said in its memorandum:

> "However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself he should where disposition of the contempt charge can be withheld until after trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge."

I

Section 750 Judiciary Law as construed and applied is unconstitutional in that it is vague and uncertain.

Whatever basis there may have been at common law for summary powers to punish for a contempt, the source of that power in New York is found in the statute, Sections 750-752, 755, Judiciary Law. Noteworthy is the opening sentence of the law, expressly limiting the power to punish to the following acts, and *no other*, thus circumscribing any claims under the common law.* *People* v. *Oyer, etc. Court*, 36 Hun 277, affirmed 101 N. Y. 245.

The appellant was prosecuted under subdivision 1 of Section 750, of the Judiciary Law which provides for punishment of disorderly, contemptuous, or insolent behavior in the presence of the court and which tend to interrupt the proceedings or to impair the respect done to it. He was found guilty for conduct which was "wilfully contemptuous and insolent and in a manner directly tending to interrupt the proceedings of the Court and to impair the authority due to it" (R. 40).

Under existing practice the vague language permits meaning to be given to it by the very same judge who is to adjudge and sentence the accused. All of which is reminiscent of Lewis Carroll in "Through the Looking Glass":

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

*It should be noted, however, that Sections 600, 601, 602 Penal Law, provide a separate crime, a misdemeanor, and appeared before this Court in *Regan* v. *New York*, 349 U. S. 58; see also *People* v. *DeFeo*, 308 N. Y. 595.

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."

How is an accused to know what is proscribed or be able to prepare to meet the charges? The courts in early constructions of the statute realized that the offense of contempt was not clearly defined and warned that caution was necessary in proceedings to punish. *Rutherford* v. *Holmes,* 5 Hun 317, affirmed 66 N. Y. 368; *People* v. *Oyer etc. Court,* 36 Hun 277, affirmed, 101 N. Y. 245; *Sherwin* v. *People,* 100 N. Y. 351; *People* v. *Riley,* 25 Hun 587.

Section 750 is vague and indefinite. It violates the principle enunciated in *Winters* v. *New York,* 333 U. S. 507 that, "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." The uncertainty in the statute provides a judge with an elastic weapon whereby he can give the words the meaning he chooses.

In *Commonwealth* v. *Carpenter,* 91 NE (2d) 666 the Supreme Court of Massachusetts declared a statute unconstitutional because it rendered a person guilty of disorderly conduct who loitered for 7 minutes after he was ordered by a policeman to move on. That court held the statute to lack standards capable of evaluation.

See also, *Thompson* v. *Louisville,* 362 U. S. 199, where the case turned on the sufficiency of the evidence in a charge of "loitering" and "disorderly conduct."

The New York statute gives the judge *ad hoc* legislative powers to define in his own cause, what is contemptuous or disorderly. This is clearly endowment of autocratic power which can be exercised with terror and tyranny.

Nor does the age of a statute, like Section 750, while impressive, save it from constitutional attack. *Winters* v. *New York, supra.*

II

Section 751, Judiciary Law as construed and applied is unconstitutional as a denial of due process.

The Court of Appeals in its certificate noted that the appellant presented and that court passed upon the federal question of "the trial judge's invoking of summary power under §751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed," and the "same trial judge's presiding in the resulting contempt proceeding even though he was the judge 'personally attacked' ". It thus construed the statute to enable the institution of summary contempt proceedings after the commission of the offense. It also construed the statute so as to permit a judge in a summary contempt proceeding to sit in his own case. It is submitted that the statute so construed denies the appellant due process of law. Since Section 751 is the source for punishment of summary contempt, the Court of Appeals construed it (as its certificate indicates) to permit summary trials before the same judge who is involved.* The statute therefore is subject to the infirmities argued in the next point, under the heading, "The Trial of the Contempt proceeding by the Same Judge, etc." For the sake of brevity the arguments are not here repeated, but are incorporated herein.

* Section 755 (p. 6 *supra*) expressly provides for summary proceedings. Although it was not referred to in the challenges below, nevertheless, its scope is embraced within the construction given to Section 751, as formulated by the certificate of the Court of Appeals.

III

The trial of the contempt proceeding by the same judge who charged appellant with contempt was a denial of due process, especially when the judge was in an adverse position to him.

(1)

The appellee postponed the contempt proceedings against appellant until after the conclusion of the Jack trial, when he served a notice of hearing with supporting papers on the appellant. The appellee contended in the courts below that the proceeding was nevertheless summary.* And from that he concluded that in such proceeding due process is not required—the judge, sitting in his own cause, may convict a contemnor without affording him an opportunity to explain or defend himself, deprive him of counsel and of an opportunity to call witnesses on his behalf.

The procedure pursued by the appellee of postponing contempt proceedings until after the trial and proceeding on papers has complicated the issues. The procedure is not that of *Sacher* v. *United States*, 343 U. S. 1, where the alleged contempts were in open court and contempt pro-

* The dismissal of the appeal by the Appellate Division and its rendition of judgment on the merits in the Article 78 proceeding, the remedy provided for review of summary contempt proceedings would leave the inference that the Appellate Division treated this case as a summary one. The affirmance by the Court of Appeals of the dismissal leaves the same implication. In this connection, it should be observed that while affirming the dismissal, the Court of Appeals nevertheless, in its remittitur passed judgment on the proceedings by its admonition, and subsequently, in amending its remittitur stated it had passed on the merits of the substantive issues raised by appellant, thus leaving the conclusion that it passed on the merits of the appeal.

ceedings were postponed until after the end of the trial, at which time the judge then and there, without commencing a proceeding on papers, convicted the accused. Nor is this case one where the alleged contempt occurred outside the presence of the trial judge.

Appellant argues here, however, that irrespective of whether the proceedings are labelled summary or non-summary, he was denied due process at a trial of contempt proceedings under a statute, as construed by the courts, authorizing summary proceedings to be held by the same judge who accused the appellant of contempt and was personally the subject of attack by appellant.

(2)

The indisputable fact is that the judge who tried the contempt proceeding was the same person who accused the appellant of contempt of court. And it is also an undisputed fact that the proceeding was commenced on December 8, 1960 returnable December 13, 1960, for an alleged contempt of court committed on November 25, 1960 and after the trial at which the contempt was committed had been concluded.

The charge of contempt was that on November 25, 1960, the appellant while testifying as a witness in a criminal case before appellee, said in open court,

> "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence." (R. 67-68; 40)

A serious question is thus presented: Was the appellant denied due process when the judge who charged the contempt undertook to try and adjudge the appellant?

In the administration of justice, it has been axiomatic that a judge should not sit in judgment in a cause in which he has an interest, especially that of accuser. In *re Murchison*, 349 U. S. 133, this court reviewed a prosecution for contempt that arose under state practice which permitted a judge to sit in judgment in a cause in which he was the accuser. *Murchison* posed the question of due process, for there a one-man grand jury consisting of a single judge, charged witnesses who appeared before him with contempt. Thereupon, the same judge tried and adjudged them in contempt. This violation of the elementary integrity of justice was intolerable to the sense of fairness of this court, which condemned the action as a violation of due process. This court there said (136):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey *v.* Ohio, 273 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt *v.* United States, 348 U. S. 11, 14."

Page 138:

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. • • •
>
> "• • • Moreover, as shown by the judge's statement here a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant."

See also *Re Oliver*, 333 U. S. 257; *Tumey* v. *Ohio*, 273 U. S. 510.

Likewise, this court in *Offutt* v. *United States*, 348, U. S. 11, a summary proceeding, overruling *Sacher* v. *United States*, *supra* by implication, had occasion to point up the offensiveness of the judge who undertakes to punish for a contempt in his own cause. *Offut* was decided later than *Sacher*. Yet it held that where there was personal involvement by the judge with the accused, the contempt proceedings should be held before another judge. See also *Cooke* v. *United States*, 267 U. S. 517; *Brown* v. *United States*, 359 U. S. 41, 61; *Wiener*, in 48 A.B.A.J. 1024; Note, 69 Harvard Law Review, 161 (1955); 3L. ed. 1862, Sect. 11; 64 ALR 2d, 621, Sect. 12(b).

If any doubt lingered that *Sacher* had been overruled, this court dispelled such doubts by its decision this term in *Panico* v. *United States*, No. 45, October 21, 1963, 11 L. ed.

2d 1. In that case the petitioner had been adjudged in criminal contempt of court for his conduct at a trial in which he was a defendant. For his conduct at the trial, he was summarily adjudged in contempt *after* the conclusion of the trial. This court held that the petitioner was entitled to a plenary hearing "to determine the question of petitioner's criminal responsibility for his conduct."

Fisher v. *Pace*, 336 U. S. 155, serves as an apt illustration of the tyranny that is latent in the power to punish for contempt especially, in a summary proceeding, as was that case, held before the same judge immediately *at* the contempt occurrence. The dissenting opinion of Justice Douglas, with the concurrence of Justice Black at page 163, and the dissenting opinions of Justice Murphy, page 166 and of Justice Rutledge, page 168, point up the flagrant abuses about which appellant complains.

Since the appellant stood in an adversary relationship with appellee by reason of appellant's attack on him, it is all the more reason that *Offutt* should apply here.* *Craig* v. *Hecht*, 263 U. S. 255, 279.

(3)

Whatever be the state of the law now on the subject of summary and non-summary contempt proceedings, three justices of this court (the Chief Justice, Justice Black and Justice Douglas) called upon the court in *Green* v.

* True, *Offutt*, *Panico*, *Sacher* and *Green* were federal cases, decided under the supervisory powers of this court. Nevertheless, the principles of due process that were drawn into the decisions apply to this state case. A trial under due process must meet the test of fairness whether it be in a federal or in a state court. Because of the challenges to the validity of the state statutes which deny appellant the protections he seeks under the federal constitution, this case presents a broader scope and significance than the federal cases controlled by the supervisory powers of this court.

United States, 356 U. S. 165, 193 to reconsider this most fundamental aspect of due process, inherent in even summary proceedings, that there shall be an impartial judge in a cause, *whether the offense was committed in the presence of the court or not.*

Justice Black, after stating the words quoted at pp. 28-29, *supra,* took great pains to condemn all summary trials of criminal contempt in these words:

> Indeed if any other officer were presumptuous enought to claim such power I cannot believe the courts would tolerate it for an instant under the Constitution. Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, as well as others which need not be mentioned, undoubtedly led to the determination of those who formed our Constitution to fragment power, especially the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a check on the activities of the others and a shield against their excesses thereby securing the people's liberty.
>
> When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indis-

pensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. In the words of this Court: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome • • • Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." In re Murchison, 349 U. S. 133, 136-137. Cf. Chambers *v.* Florida 309 U. S. 227, 236-237; Tumey *v.* Ohio, 273 U. S. 510; In re Oliver, 333 U. S. 257.

(4)

Moreover, whatever justification may be discerned in permitting a judge to summarily punish at the time of the offense loses validity with respect to proceedings to punish for the offense, as here, 18 days after the offense and conclusion of the trial at which it took place. It might be argued that a judge himself should be empowered to summarily try and punish for an offense committed in his presence as a means towards keeping order at the trial and efficiently dispatching it (although contrary argument could be made that there are other means of attaining such results without the necessity of empowering a judge with such autocratic powers).

But the end sought by the grant and exercise of such powers becomes non-existent after the trial is concluded. The emergency gone, contempt proceedings after the trial should therefore be respected with the due process, guaranteed in plenary adjudications.

Furthermore, the opportunity for the appellant to prove his emotional state was also impaired, since the judge did nothing at the time of the incident to verify his own accusation that the appellant was malingering, although he took two recesses for that purpose (58-63). *Panico* v. *United States*, 11 L. ed. 2d, 1. Attempting to prove it 18 days later might be a futility (58). *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425.

(5)

Even the Court of Appeals in this case recognized the unfairness of the procedure (p. 1, *supra*).

Since the contempt charge had been withheld in this case until after the trial of the action in which the contempt occurred, the Court of Appeals should have made its pronouncement effectual by reversing the proceedings. Unfortunately, its statement was of no aid to the appellant. It is merely an admonition for use in subsequent cases by those who might ferret it out. Appellant was thus denied due process of law. He was not given the benefit of the construction of the statute on his own appeal, but instead, was the guinea pig for the benefit of others. *Lanzetta* v. *New Jersey*, 306 U. S. 451.

(6)

Appellant did make a personal attack on appellee by accusing appellee of badgering him and suppressing the evidence. They were consequently cast in adversary roles. This is contrary to the finding of the Court of Appeals that no personal attack was made. This court, however, may review such finding because it affects the constitutional right claimed to have been denied. *Chambers* v. *Florida*, 309 U. S. 227, 228; *Niemotko* v. *Maryland*, 340 U. S. 268, 271.

Fulfillment of due process should not be dependent upon distinction whether the contempt was an attack upon the judge personally or whether it was an offense against the dignity of the court and good order. Justice Jackson in *Sacher* well pointed out that there really is no separation, because the offense is directed at the judge as a person although he is sitting as a court. See also, *Craig* v. *Hecht*, 263 U. S. 255, 279.

(7)

In any event, in this case, the appellee felt himself personally offended when the appellant made the statement for which he was charged with contempt. The petitioner had stated, "I am absolutely unfit to testify because of your Honor's attitude and conduct towards me." Thereupon the appellee replied, "You are not only contemptuous but disorderly and insolent" (R. 57).

(8)

Indeed, it was most essential that the contempt proceeding be held before an impartial judge, because the judge was hostile toward appellant from the very inception of his several days on the witness stand; furthermore, there was a genuine issue whether the alleged contemptuous words were compelled by the emotional distress of three days of testifying in a hostile atmosphere (R. 84-86), and moreover, the judge as an adversary would have been subject to examination as a witness and as such, could adjudicate objections raised during his testimony (*Re Murchison*, 349 U. S. 133, 138).

IV

The appellant was not accorded due process of law in the contempt proceeding.

This Court, in *re Oliver* 333 U. S. 257 and recently reaffirmed in another state case, in *re Green,* 369 U. S. 689 (1962), held that in contempt proceedings due process is satisfied if the following conditions are met: 1) the accused must be advised of the charges; 2) he must have a reasonable opportunity to meet the charges by way of (a) defense or (b) explanation; 3) he must have the right to be represented by counsel; and 4) he must be afforded an opportunity to call witnesses.

These conditions do not exact more than fairness requires, since a contempt proceeding is a criminal prosecution. Holmes, J., in *Gompers* v. *United States,* 233 U. S. 604, 610-611.

None of those conditions were met in this case, except that the appellant received notice of the proceeding and the lengthy charges four days before the return date.

The appellant was denied a reasonable opportunity to meet the charges by way of defense or explanation and was in effect, denied counsel because counsel could not represent the appellant upon the refusal of a short adjournment by the court to enable him to prepare.

The contempt proceeding was begun by the service of an order to show and supporting papers, which in the printed record occupy 24 pages (R. 67-91) of 14 complex and confusing specifications in late afternoon of Thursday, December 8, 1960, returnable on Tuesday, December 13, 1963. During the weekend of December 10 and 11, a 17 inch snowstorm paralyzed traffic and work in New York (R. 35). Appellee, with the copious assistance

of the district attorney's staff had devoted six days to preparing the moving papers.

Nevertheless, when appellant appeared at the hearing on December 13, he was denied a short adjournment in order to enable appellant's chosen counsel, who had another court engagement that day, to prepare for the hearing (R. 96-97). Counsel had to withdraw his appearance since he could not obtain the adjournment for the purpose of enabling him to prepare an adequate defense. Thereupon, the appellee immediately proceeded to try appellant without counsel and without reasonable opportunity to prepare his defense or give explanation (R. 100). Appellant pleaded with the court to afford him an opportunity to prepare a defense against the contempt charge. He stated that he had not committed a contempt or ever intended to do so. Appellant required time too, to support his defense with proof of medical testimony that the words allegedly contemptuous were the product of an emotional strain and that he had received medication during the recess on November 25, to alleviate the strain. But the court disregarded these pleas, and adjudged him in contempt (R. 102, 108).

Considering the volume of the paper work alone involved in the contempt proceedings, the researches required of the exhibits of testimony of the trial at which appellant testified, the complex and difficult questions of statutory and constitutional law involved and the medical testimony to be collected, it is obvious that counsel could not adequately prepare himself in the two days available. Yet here, counsel retained on Saturday for the hearing on Tuesday also had another court engagement. The appellant's request for an adjournment was under the circumstances reasonable. It could not have mattered for the prompt vindication of the court whether an adjournment

for 8 days or 18 days was granted. No one would have been prejudiced. Yet, appellee refused to grant one (R. 412).

It cannot be said that the appellant had 18 days notice, because he had been cautioned at the trial that he was contemptuous, or that he should "hold himself available" —whatever such words signify. His notice began when he was served on December 8 with a notice of a proceeding. Until that time he had no charges against him against which to prepare. For all he knew, the episode might have blown over.

Therefore, when the adjournment was denied and counsel withdrew from the case, the appellant was denied the opportunity to be represented by counsel; he was denied an opportunity to adequately defend or explain himself and was denied the opportunity to call witnesses in his behalf.

Even state practice should have accorded him the adjournment. Evidently, the hostile atmosphere in which the proceeding was conducted deprived him of those constitutional protections. The refusal of an adjournment was a violation even of the Rules of appellee's own court. Rule VII of the Rules of the Court of General Sessions of the County of New York states:

> "No adjournment of trial shall be granted by reason of engagement of counsel * * * unless it be made to appear by affidavit that counsel * * * is actually engaged in the trial of a case in a court of record of the State of New York, *in which event the trial of the action shall be passed* for the day or until such argument or trial is concluded * * *"

See also, *Matter of Rotwein*, 291 N. Y. 116; *People* v. *McLaughlin*, 291 N. Y. 483; *People* v. *Koch*, 299 N. Y. 378, 381; *People* v. *Gordon*, 262 A.D. 534, 536.

V

The conduct of the appellant was not contemptuous under the circumstances of provocation and emotional distress; and a construction of the vague statute to render appellant guilty is a denial of due process.

Section 750 Judiciary Law, under which appellant was prosecuted, empowers a court to punish for a criminal contempt when the conduct is disorderly, contemptuous or insolent, directly tending to interrupt the court's proceedings and impair its respect. Under this vague statute this appellant was adjudged guilty on the single charge that on November 25, 1960 after 3 days of testimony and after he had repeatedly pleaded with the court in vain for a recess, he made the accusation against the judge.

His words cannot be assessed in a vacuum if determination is sought whether they are of the character the statute condemns.

It is necessary to read the record of the events prior to those words and subsequent thereto. It must be borne in mind that the appellant, a lawyer, had been named in the indictment of Hulan Jack of conspiring with Jack to obstruct justice and for having given Jack gifts or loans in violation of law. Although the appellant was not a defendant, he as a lawyer and as a citizen was actually exposed as an alleged co-conspirator to the attendant publicity of pretrial and long trial and retrial procedures. As a witness called by the People he was subject to the inquisition which put his character and reputation to public view. It is understandable that a person in such position would be under a strain and would be cautious in his answers, even to the point of insisting as a party to the transaction on bringing out the "whole story", where he felt there was

nobody at the trial who was interested in doing so. Even if such conduct be deemed offensive, it is nevertheless, understandable. Yet, the appellee and the district attorney, whose witness appellant was, took a hostile attitude toward him, from the very beginning of his testimony, intimating that appellant had been responsible for the retrial that had been necessitated through disagreement of the jury at the first trial where petitioner had testified for 7 days. An example appears at 84:

> "The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment."

A picture of the trial would depict appellant, a witness laboring under emotional pressures and tensions in a courtroom in which the court was hostile toward him, and the invective of both the prosecution and defense trained against him to make it appear as if he were the person on trial. In fact, at one time during the course of Jack's trial, the appellee subconsciously referred to appellant as "the defendant" (R. 57 fol. 80).

With the emotional strain building up from questions which the witness in good faith felt he could not answer fully and honestly, it is not surprising that on the third day of testimony, the following respectful plea ensued, (R. 55):

> "The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am muc' too nervous. And I can't testify under these circumstances. I am not being a vol-

untary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances."

Then followed (R. 56):

"The Witness: I can't testify, your Honor. I am shaking all over, And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

I ask for the privilege of leaving the stand, your Honor.

The Court: No, you will remain on the stand.

The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

The Witness: I would like to leave the stand, your Honor.

The Court: No, you may not leave the stand."

The court disregarded those repeated requests, and proceeded (R. 56):

"The Court: Proceed, Mr. Scotti.

The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

The Court: You are not only contemptuous but disorderly and insolent.

The Witness: I have asked for the privilege of leaving the stand for five minutes.

The Court: Put your question, Mr. Scotti.

Mr. Baker: May I renew my motion?

The Court: The motion is denied.

Mr. Baker: Exception.

Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me? A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

The Court: Do you refuse to answer?

The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

The Court: Do you refuse to answer the question, Mr. Ungar?

The Witness: I said I can't answer the question, your Honor.

The Court: Put the question, Mr. Reporter:

Mr. Scotti: Mr. Reporter, read the question.

(The question was read by the Court Stenographer as follows:

'Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?')

The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

Mr. Scotti: You mean the witness, your Honor.

The Court: What did I say?

Mr. Scotti: The defendant.

The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess."

The circumstances under which the words were uttered show that they were not wilful, but made in good faith

in the belief they were true and while under a severe emotional strain. This is verified by the fact that during the recess appellant obtained medical assistance at a hospital, testified that day and at the subsequent trial date without incident (R. 61). The appellee had accused the appellant of malingering without proof or verification (R. 58), but did nothing then or at any time about establishing that fact.

From the foregoing, the only conclusion permissible is that the appellant in good faith sought to testify fully, but through the badgering of the district attorney and the provocations of the appellee, the incident occurred with which the appellant was charged. A finding that the appellant violated the vague statute cannot comport with due process. *Thompson* v. *Louisville, supra;* also *People* v. *De Feo,* 308 N. Y. 595, which holds that contempt is a *wilful* wrong.

It is ironical that when another witness, Robert Moses, testified, the appellee hardly reacted to his attitude as a witness, although his attitude was not in a class different from appellants (R. 131, 135, 139, 140).

CONCLUSION

The judgments below should be reversed.

Because of the hybrid remedy selected by appellee, it is necessary that the threads of the argument be gathered together in these closing words.

If the remedy pursued by the appellee be deemed simply a summary one, in that appellee had a right to punish appellant without a hearing and immediately after the outburst, then appellant should then have been afforded an opportunity to explain his emotional outburst. The

record reveals the emotional strain under which appellant was suffering and the medical attention required. Since appellee chose to postpone the hearing until after the trial he should have afforded appellant a plenary hearing in which to make explanation of his good faith and his emotional strain. And out of the respect for the principles enunciated in the *Offutt* case, such a proceeding should have been held before another judge.

In any event, the call for reconsideration of the procedures in summary contempt sounded by Justice Black should be heard now. This case makes such a call appealing. It will direct the future administration of justice in such cases. Present practice in contempt proceedings is in woeful confusion, with token recognition being given, as did the Court of Appeals in this case, to the need for caution against violating due process.

If this proceeding be deemed non-summary, then of course, all the requirements of due process in a plenary suit should have applied. The appellant was entitled to an effective right to be represented by counsel, to meet the charges and to produce witnesses. In summary, he was entitled to due process, but it was denied to him.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
60 Wall Street,
New York 5, New York.

November 25, 1963.